

TABLE OF CONTENTS

	<u>Page</u>
EXECUTIVE SUMMARY	iii
PETITION FOR RECONSIDERATION	1
I. INTRODUCTION	2
II. STATUTORY VIOLATIONS	4
A. APPLICABLE LEGAL STANDARDS	4
B. THE COMMISSION LACKS AUTHORITY PURSUANT TO SECTION 309(J) OF THE COMMUNICATIONS ACT TO CONDUCT AUCTIONS OF HEAVILY OCCUPIED 800 MHZ SPECTRUM	5
C. AUCTION OF THE OCCUPIED 800 MHZ SPECTRUM VIOLATES SECTION 309(J)(3)(B) OF THE ACT WHICH REQUIRES THE COMMISSION TO PROMOTE ECONOMIC OPPORTUNITY AND AVOID EXCESSIVE CONCENTRATION OF LICENSES.	7
D. THE COMMISSION VIOLATED ITS STATUTORY MANDATE TO ACHIEVE REGULATORY PARITY AMONG "SUBSTANTIALLY SIMILAR" CMRS PROVIDERS BY ADOPTING RULES THAT FAVOR THE EA AUCTION WINNING SMRS OVER INCUMBENT SMRS	11
III. ARBITRARY AND CAPRICIOUS RULE MAKING	15
A. APPLICABLE LEGAL STANDARDS	15
B. EVEN IF THE COMMISSION HAS THE STATUTORY AUTHORITY TO AUCTION SPECTRUM THAT IS ENCUMBERED BY A DOMINANT STAKEHOLDER, THE COMMISSION'S ACTIONS WERE ARBITRARY AND CAPRICIOUS BECAUSE THE COMMISSION FAILED TO ADEQUATELY CONSIDER THE PUBLIC INTEREST IN PROMULGATING ITS RULES	16
C. THE RULES SET FORTH IN THE <u>FIRST R&O</u> AND THE <u>EIGHTH R&O</u> MUST BE SET ASIDE AS ARBITRARY AND CAPRICIOUS BECAUSE THE COMMISSION FAILED TO ADDRESS THE COMPETITIVE CONCERNS SURROUNDING NEXTEL'S DOMINANT STAKEHOLDER POSITION IN THE 800 MHZ SPECTRUM	19

TABLE OF CONTENTS

	<u>Page</u>
IV. FAILURE TO DISCLOSE EX PARTE COMMUNICATIONS IN VIOLATION OF COMMISSION RULE 1.1206	22
V. CONCLUSION	24

EXECUTIVE SUMMARY

The Southern Company ("Southern") believes that the rules set forth in this proceeding are misguided. More importantly, however, Southern believes that the Commission exceeded its statutory authority and violated the Administrative Procedures Act in promulgating these rules. Specifically, Southern believes that the Commission lacks authority under section 309(j) of the Communications Act to conduct auctions of heavily occupied 800 MHz spectrum. The auction authority granted to the Commission in section 309(j) only applies to initial licenses, not existing licenses.

Additionally, the auction of the 800 MHz spectrum violates section 309(j)(3)(B) of the Communications Act which requires the Commission to promote economic opportunity and avoid excessive concentration of licenses. Because the rules set forth in the First R&O overwhelmingly favor one predominant stakeholder, Nextel, the Commission failed to heed Congress's statutory command to promote competition and avoid the excessive concentration of licenses.

Equally significant, the Commission violated its statutory mandate requiring regulatory parity among "substantially similar" CMRS providers because the rules

promulgated in the First R&O favor the EA auction winning SMRs over incumbent SMRs. Both the right to recover unconstructed channels on blocks for which it is licensed and the construction criteria provide EA license winners with an unfair advantage over existing SMRs.

Alternatively, even if the Commission has the statutory authority to auction encumbered spectrum, the Commission's actions were arbitrary and capricious because the Commission failed to adequately consider the public interest in promulgating its rules. The Commission's decision did not properly weigh how competition between existing SMR providers and the EA auction winners would be affected by the proposed rules.

Finally, the rules set forth in the First R&O and the Eighth R&O must be set aside as arbitrary and capricious because the Commission failed to address the anticompetitive concerns surrounding Nextel's dominant licensing position in the 800 MHz spectrum.

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of)	
)	
Amendment of Part 90 of the)	PR Docket No. 93-144
Commission's Rules to)	
Facilitate Future Development)	
of SMR Systems in the 800 MHz)	
Frequency Band)	
 Implementation of Sections)	GN Docket No. 93-252
3(n) and 322 of the)	
Communications Act Regulatory)	
Treatment of Mobile Services)	
 Implementation of Section)	
309(j) of the Communications)	PP Docket No. 93-253
Act - Competitive Bidding)	
 To: The Commission		

PETITION FOR RECONSIDERATION OF THE
FIRST REPORT AND ORDER AND THE EIGHTH REPORT AND ORDER

The Southern Company ("Southern"), through its undersigned counsel and pursuant to Section 1.429 of the Commission's rules, submits this Petition for Reconsideration of the First Report and Order (hereinafter "First R&O") and the Eighth Report and Order (hereinafter

"Eighth R&O"), FCC 95-501, released February 16, 1996, in the above-captioned proceedings.^{1/}

I. INTRODUCTION

1. Southern is licensed for and operates a wide-area system which includes SMR (both the upper 200 and lower 80) channels and General Category channels.^{2/} Upon completion, Southern's wide-area SMR system will provide state-of-the-art digital service throughout Alabama, Georgia, the panhandle of Florida, and southeastern Mississippi. The system will provide internal communications for Southern's five operating companies as well as will provide service to other industrial users on a commercial basis. Southern has implemented its system in reliance upon existing 800 MHz rules and, as such, Southern is directly affected by rules contained in the First R&O and Eighth R&O. Accordingly, Southern has standing to seek reconsideration of the First R&O and Eighth R&Os for the reasons set forth below. See Panhandle Eastern Pipeline Co., 4 F.C.C.R. 8087, 8088 (1989).

^{1/} First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making, adopted Dec. 15, 1995, 61 Fed. Reg. 6138 (February 16, 1996).

^{2/} Southern's system also includes channels from other 800 MHz frequency pools that have been converted to SMR status.

2. Southern seeks reconsideration of the Commission's First R&O and the Eighth R&O in above captioned proceedings for the following reasons:

- The Commission lacks authority pursuant to section 309 of the Communications Act to conduct auctions of heavily occupied 800 MHz spectrum.^{3/}
- Auction of the 800 MHz spectrum violates section 309(j)(3)(B) of the Communications Act which requires the Commission to promote economic opportunity and avoid excessive concentration of licenses.
- The Commission violated its statutory mandate to achieve regulatory parity among "substantially similar" CMRS providers by promulgating rules that favor the EA auction winning SMRs over incumbent SMRs.
- Even if the Commission has the statutory authority to auction encumbered spectrum, the Commission's actions were arbitrary and capricious because the Commission failed to adequately consider the public interest in promulgating its rules.
- The rules set forth in the First R&O and the Eighth R&O must be set aside as arbitrary and capricious because the Commission failed to address the anticompetitive concerns surrounding Nextel's dominant licensing position in the 800 MHz spectrum.

^{3/} Eighth R&O ¶ 148.

II. STATUTORY VIOLATIONS

A. APPLICABLE LEGAL STANDARDS

3. An agency construing its organic statute should be mindful of the two-step inquiry set forth by the Supreme Court in Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 81 L.Ed. 2d 694, 104 S. Ct. 2778 (1984). The first step is to determine if Congress has directly spoken to the issue. If the intent of Congress is clear, an agency, like a reviewing court, must give effect to the unambiguously expressed will of Congress. Id. at 842-43. Moreover, Chevron cautions that an agency should use "traditional tools of statutory construction" to determine Congress's intent on the precise question at issue. Id. 843 n. 9. The first step, and primary interpretive tool, should be the language of the statute itself. ACLU v. Federal Communications Comm'n, 823 F.2d 1554, 1568 (D.C. Cir. 1987) (citing Landreth Timber Co. v. Landreth, 471 U.S. 681, 685, 85 L. Ed. 2d 692, 105 S. Ct. 2297 (1985)).

4. Furthermore, courts require that an agency adequately articulate the reasons underlying its construction of a statute so that a reviewing court can properly perform the analysis set forth in Chevron. See Acme Die Casting v. NLRB, 26 F.3d 162, 166 (D.C. Cir. 1994); Leeco v. Hays, 965 F.2d 1081, 1085 (D.C. Cir. 1992) ("In the

absence of any explanation justifying [the agency's position] as within the purposes of the act . . . , we are unable to sustain the Commission's decision as reasonably defensible." (internal quotations omitted).

B. THE COMMISSION LACKS AUTHORITY PURSUANT TO SECTION 309(j) OF THE COMMUNICATIONS ACT TO CONDUCT AUCTIONS OF HEAVILY OCCUPIED 800 MHZ SPECTRUM

5. Section 309(j) provides the statutory authority for the auction mechanism; that section provides, in relevant part:

If mutually exclusive applicants are accepted for filing for any initial license or construction permit which will involve a use of the electromagnetic spectrum described in paragraph (2), then the Commission shall have the authority, subject to paragraph (10), to grant such license or permit to a qualified applicant through the use of a system of competitive bidding that meets the requirements of this subsection.

47 U.S.C. 309(j)(1) (emphasis added).^{4/} The express language of § 309(j) confers authority to conduct auctions only upon the filing of exclusive applications for an initial license, and only for a license involving use of the spectrum. The significance of the former requirement is

^{4/} See Amendments to the Communications Act of 1934 contained in the Omnibus Budget Reconciliation Act of 1993 ("1993 Budget Act"), Pub. L. No. 103-66, 107 Stat. 312 (1993).

made clear by the fact that, in tailoring § 309(j), Congress expressly excluded applications for renewal or modifications from the auction process.^{5/} Congress clearly chose not to expose every license to the possibility of predation by auction. The auction mechanism has no application or relevance to spectrum which is already occupied and licensed. The statute by its plain language, only authorizes the use of the auction mechanism to license spectrum which, aside from the competing application[s], is otherwise available.

6. The Commission exceeded its statutory mandate by determining that the 800 MHz SMR service is auctionable because the Commission's interpretation is contrary to the express will of Congress. Southern does not believe that the Commission has the legal authority to conduct an auction under the circumstances where there really is not any "spectrum" to auction, but rather simply "marketing rights."

7. The Commission attempts to bring the 800 MHz block auction within the plain language of the statute by reasoning that EA licenses are initial licenses because the

^{5/} H.R. Rep. No. 111, 103rd Cong., 1st Sess. 253 (1993), reprinted in 1993 U.S.C.C.A.N. 572, 580.

Commission has not previously issued such licenses.^{6/} This strained effort simply does not comport with the purposes of the 1993 Budget Act amendments to the Communications Act. Congress' intent was to make new spectrum blocks available to the public for initial licenses subject to competitive bidding, but not licenses already issued such as those subject to "renewal" or "modification".^{7/} Therefore, the Commission's conclusion that an EA license is an initial license when issued in occupied spectrum is simply not a reasonable interpretation of the statute. For this reason, the Commission must abandon its decision in the Eighth R&O to conduct auctions in the heavily occupied 800 MHz spectrum.

C. AUCTION OF THE OCCUPIED 800 MHZ SPECTRUM VIOLATES SECTION 309(J)(3)(B) OF THE ACT WHICH REQUIRES THE COMMISSION TO PROMOTE ECONOMIC OPPORTUNITY AND AVOID EXCESSIVE CONCENTRATION OF LICENSES.

8. Section 309(j)(3) outlines the procedures for conducting "competitive bidding." Specifically, § 309(j)(3) directs the Commission to "[promote] economic opportunity and competition and . . . [avoid] excessive concentration of licenses."^{8/} These principles apply to the bidding

^{6/} Eighth R&O ¶ 148.

^{7/} H.R. Rep. 103-111 at 246, 1993 U.S.C.C.A.N. at 573.

^{8/} 47 U.S.C. § 309(j)(3)(B).

methodology, the process of identifying classes of licenses to be issued and the process of specifying the characteristics of such licenses.^{9/} Because the regulations that the Commission issued creating the EA license in the 800 MHz spectrum heavily favors a single, predominate, and incumbent stakeholder, Nextel, the regulations violate the unambiguously expressed will of Congress, and, therefore, must be reversed.

9. The Commission cannot deny that the rules set forth in the First R&O creating the EA license and

^{9/} Section 309(j)(3) provides, in relevant part:

In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 151 of this title and the following objectives . . .

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women[.]

specifying its characteristics overwhelmingly favor Nextel to the detriment of all other SMRs. Many commenters highlighted this significant fact during the comment stage of this proceeding.^{10/} Nextel controls over 60% of all the licensed and pending 800 MHz channels designated for SMR use in the 800 MHz spectrum across the country.^{11/} In some markets, Nextel controls up to 92% of all the licensed SMR channels.^{12/}

10. When the Commission promulgated the rules set forth in the First R&O, the Commission was aware that there was one predominate stakeholder of licenses in the 800 MHz spectrum. As such, when promulgating the rules to define the characteristics of the EA license, the Commission was statutorily required to consider whether Nextel's predominate position in the 800 MHz spectrum would lead to an "excessive concentration of licenses." This, the Commission did not do.

^{10/} Comments of Thomas Luczak at 5, Parkinson Electronics Company, Inc. et al. at 7, Supreme Radio Communications, Inc. at 4-5, SMR WON passim and Southern passim.

^{11/} See SMR Won Comments at 29-30; see also Nextel's Comments ¶ 26.

^{12/} Id. at 30, Table "Nextel Channel Concentration".

11. First, the Commission adopted an allocation plan which allocates the upper 200 channels for auction in 120, 60 and 20-channel blocks.^{13/} Next, the Commission determined not to adopt aggregation limits for the EA auctions and, as such, a single entity could win all three blocks in a single EA.^{14/} In turn, the Commission determined that in order for an EA auction winner to force an incumbent licensee to relocate, the EA licensee would have to provide "comparable" spectrum to satisfy the involuntary relocation rules.^{15/} Significantly, however, the Commission failed to recognize that in all likelihood only Nextel has sufficient "comparable" spectrum on a 20, 60 or 120-channel basis for the retuning of incumbent licensees. Any other potential auction winner would not only have to pay the cost of the EA license, but would also have to pay to obtain sufficient replacement spectrum in the 800 MHz band for the retuning of incumbents. It also appears that an auction winner would have to relocate an

^{13/} First R&O ¶ 37.

^{14/} Id. ¶¶ 42-44.

^{15/} In order to request involuntary relocation of an incumbent's system, the "EA licensee must: (1) guarantee payment of all costs of relocating the incumbent to a comparable facility; (2) complete all activities necessary for placing the new facilities into operation, including engineering and frequency coordination, if necessary; and, (3) build and test the new system." First Report and Order ¶ 79.

incumbents entire system which effectively precludes most participants from the auction. Given the enormous concentration of 800 MHz SMR licenses in the hands of one potential auction participant, Nextel, the Commission's allocation plan and mandatory relocation rules are likely to lead to an "excessive concentration of licenses."

12. For the reasons stated above, the channel allocation plan and mandatory relocation rules adopted in the First R&O violate the Congressional command to avoid the excessive concentration of licenses when promulgating rules to identify classes of licenses to be issued and when specifying the characteristics of such licenses.

D. THE COMMISSION VIOLATED ITS STATUTORY MANDATE TO ACHIEVE REGULATORY PARITY AMONG "SUBSTANTIALLY SIMILAR" CMRS PROVIDERS BY ADOPTING RULES THAT FAVOR THE EA AUCTION WINNING SMRS OVER INCUMBENT SMRS.

13. In passing the 1993 Budget Act amendments, Congress mandated regulatory parity in the Commercial Mobile Radio Service legislative scheme. Section 6002(d)(3) of the 1993 Budget Act requires the Commission to promulgate regulations applicable to CMRS entities that were previously private land mobile service providers. This section provides, in relevant part:

[The Commission] shall make such other modifications or determinations as may be necessary and practical to assure that licensees in such service are subjected to the technical requirements that are comparable to the technical requirements that apply to licenses that are providers of substantially similar common carrier services[.]

1993 Budget Act, Title VI, § 6002(d)(3)(B). According to the legislative history, Congress intended "to provide that equivalent mobile services are regulated in the same manner. It directs the Commission to review its rules and regulations to achieve regulatory parity among services that are substantially similar."^{16/}

14. In the CMRS Third Report and Order, the Commission concluded that all CMRS licensees-- including paging, SMR, PCS, and cellular-- are actual or potential competitors with one another, and therefore should be regarded as substantially similar for determining whether the statutory requirement for comparable technical rules applies.^{17/} For this reason, throughout the First R&O, the Commission sought to achieve regulatory parity among the 800 MHz SMR auction winners, PCS and cellular. In the process of endeavoring to

^{16/} See H.R. Rep. No. 111 at 259, 1993 U.S.C.C.A.N. at 586.

^{17/} First R&O and Order ¶ 42 (citing Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Third Report and Order, 9 FCC Rcd 7988, 8009-8035 ¶¶ 37-77 (1994)).

achieve regulatory parity among 800 MHz EA licensees and PCS-cellular licensees, however, the Commission placed non-EA winning SMR licensees at a serious disadvantage, contrary to the express will of Congress.

15. For example, the EA license winner has the exclusive right to recover unconstructed or non-operational channels on blocks for which it is licensed.^{18/} In contrast, an existing licensee providing identical service to the public is substantially restricted from expanding on wide-area spectrum blocks.^{19/} More importantly, the Commission adopted construction requirements that substantially favor EA licensees over existing SMR licensees. First, the Commission determined that EA licensees should have a five-year construction period.^{20/} At the same time, the Commission determined that existing SMR licensees, who previously had been granted extended implementation authority which allowed them up to five years to construct their facilities, had to re-justify its extended implementation plan.^{21/} Even if an existing SMR can rejustify its extended implementation authority, the

^{18/} First R&O and Order ¶ 60.

^{19/} See First R&O and Order ¶¶ 85-88.

^{20/} Id. ¶ 104.

^{21/} Id. ¶ 110.

maximum construction period is two years from the time the Bureau authorizes such extension.^{22/} Second, the Commission determined to allow EA licensees to provide coverage to one-third of the population of their respective EAs within three years of the initial license grant and to two-thirds by the end of their five-year construction period.^{23/} Existing SMRs providing identical service have no such flexibility. As such, an EA license winner can satisfy its construction requirements in its EA with minimal build out simply by constructing its system in the most populous area in its respective EA, while existing SMR licensees are required to build out each and every frequency at each and every site regardless of the market demands for service.

16. Because the rules promulgated in the First R&O fail to treat "substantially similar" CMRS providers equally, the Commission's actions in the First R&O violate the unambiguously expressed will of Congress and must be reversed.^{24/} Alternatively, the Commission must modify the

^{22/} Id. ¶ 112.

^{23/} Id. ¶ 121.

^{24/} See Chevron analysis section II, supra; see also Budget Act, Title VI, § 6002(d)(3)(B).

First R&O so that the construction rules apply equally to all similarly situated SMR providers.

III. ARBITRARY AND CAPRICIOUS RULE MAKING

A. APPLICABLE LEGAL STANDARDS

17. Pursuant to § 10 of the Administrative Procedures Act, 5 U.S.C. 706(2)(A), a court will set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In determining whether agency action is arbitrary and capricious, a reviewing court will first consider whether the agency has considered the relevant factors involved and whether there has been a clear error of judgment. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971). The agency must articulate a "rational connection between the facts found and the choice made." City of Brookings Mu. Tel Co. v. Federal Communications Comm'n, 822 F.2d 1153, 1165 (D.C. Cir. 1987) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168, L. Ed. 2d 207, 83 S. Ct. 239 (1962)). A reviewing court "will not supply the basis for the agency's action, but instead rel[ies] on the reasons advanced by the agency in support of the action." Cincinnati Bell Tel. Co. v. Federal Communications Comm'n, 69 F.3d 752, 758 (6th Cir. 1995) (citation omitted). The

United States Supreme Court has "frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner." Motor Vehicle Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 48-49, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983) (citing Atchison, T. & S. F. R. Co. v. Wichita Bd. of Trade, 412 U.S. 397, 416 (1967)). Agency action accompanied by an inadequate explanation constitutes arbitrary and capricious conduct. FEC v. Rose, 806 F.2d 1081, 1088 (D.C. Cir. 1986).

B. EVEN IF THE COMMISSION HAS THE STATUTORY AUTHORITY TO AUCTION SPECTRUM THAT IS ENCUMBERED BY A DOMINANT STAKEHOLDER, THE COMMISSION'S ACTIONS WERE ARBITRARY AND CAPRICIOUS BECAUSE THE COMMISSION FAILED TO ADEQUATELY CONSIDER THE PUBLIC INTEREST IN PROMULGATING ITS RULES.

18. The Communications Act which is the enabling statute for the Commission and which defines the Commission's general powers to act, requires that all decisions regarding radio regulation must be in the "public convenience, interest, or necessity." 47 U.S.C. § 303. This mandate includes classifying radio stations and assigning frequency bands to various classes of stations. 47 U.S.C. § 303(a) and (c). The courts have warned that where the FCC's actions involve numerous departures from prior policies and precedents, they will carefully scrutinize the FCC's actions to ensure that all relevant factors and available alternatives were given adequate

consideration in the course of the rule making proceeding. Office of Communications of the United Church of Christ v. FCC, 707 F.2d 1413, 1424-25 (D.C. Cir. 1983). Although an agency may change its view of what is in the public interest, it must supply a reasoned analysis for its decision. Motor Vehicle Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 57, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983) (quoting Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970)).

19. Currently, SMR service is a mature, but growing market, which provides a valuable service to a substantial segment of the public.^{25/} Even the Commission has acknowledged that the SMR industry's strength is the breadth of service to underserved areas of the country.^{26/} As discussed more fully in section II above, in the First R&O, the Commission promulgated rules that primarily benefit one dominant stakeholder, Nextel, at the expense of all other SMR licensees in the 800 MHz spectrum.^{27/} Moreover, the Commission rules place any EA license winner at a distinct competitive advantage over existing SMR licensees.^{28/}

^{25/} Comments of SMR Won at 11-12.

^{26/} Id. at 12.

^{27/} See Discussion supra § II.C.

^{28/} See Discussion supra § II.D.

20. Equally significant, the Commission did not adequately consider the public interest in displacing existing SMRs with other SMRs who will provide the exact same service. Unlike the 2 GHz reallocation where the PCS provider does not compete with the incumbent microwave licensee, here, the reallocated incumbent licensee will be in direct competition with the EA auction winner. As such, the net result of this reallocation is not the creation of a new service, but rather is a license churning process. For this reason, the Commission should have considered how the public interest would be served by inflicting competitive disadvantage on incumbent licensees. This the Commission did not do.

21. Because the Commission never addressed the anticompetitive implications of the proposed regulations, a reviewing court will not be able to properly assess why the agency reacted to major policy issues as it did. See HBO, 567 F.2d at 41. There is no question that the Commission should have considered the anticompetitive issues. See HBO, 567 F.2d at 41 n. 68. Because the Commission did not sufficiently articulate how the public interest is served by promulgating rules which will likely lead to the concentration of a vast majority of SMR licensees in one entity's hands, the Commission's actions in the First R&O

and the Eighth R&O were arbitrary and capricious. See Motor Vehicle Ass'n, 463 U.S. at 48-49. Therefore, the Commission should reconsider the rules set forth in the First R&O and the Eighth R&O in light of the public interest in promoting competition.

C. THE RULES SET FORTH IN THE FIRST R&O AND THE EIGHTH R&O MUST BE SET ASIDE AS ARBITRARY AND CAPRICIOUS BECAUSE THE COMMISSION FAILED TO ADDRESS THE COMPETITIVE CONCERNS SURROUNDING NEXTEL'S DOMINANT STAKEHOLDER POSITION IN THE 800 MHZ SPECTRUM.

22. The rules set forth in the First R&O and the Eighth R&O must be set aside as arbitrary and capricious because the Commission failed to address the anticompetitive concerns raised by Commenters involving Nextel's control of a substantial portion of the 800 MHz SMR spectrum.^{29/} As the D.C. Circuit recognized in Home Box Office v. Federal Communications Comm'n, 567 F.2d 9, 36 (D.C. Cir. 1977), "the opportunity to comment is meaningless unless the agency responds to significant points raised by the public." (footnote and citation omitted). In these proceedings, the Commission's failure to address the anticompetitive implications of Nextel's predominate position in the 800 MHz spectrum is particularly egregious because the Department of Justice had already indicated its concern with the large

^{29/} See Comments of SMR Won passim and Southern passim.

concentration of SMR licenses under Nextel's control as a result of its merger with Motorola and other large SMR licensees.^{30/}

23. As discussed in Southern Comments,^{31/} SMR market studies show that in Southern's four-state region, Nextel^{32/} already holds 70% of the licensed SMR facilities in the 200 channel block.^{33/} Obviously, Nextel is uniquely and solely positioned to benefit from the proposed EA license auctions in the 800 MHz spectrum. It has a commanding and controlling interest in the vast majority of the 200 channel block which the Commission plans to auction, and a successful auction bid will only solidify its SMR dominance. Equally important, the 800 MHz SMR facilities not licensed by Nextel in Southern's four-state region are mostly licensed to small SMR operators holding few channels.

24. As discussed in section II.C. above, § 309(j)(3) requires that the Commission promulgate rules to "[promote]

^{30/} See DOJ Complaint, Exhibit F to the Comments of SMR Won.

^{31/} Comments of Southern ¶ 26.

^{32/} Including its consolidated entities.

^{33/} Comments of Southern ¶ 26.